84-24(1)

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JORGE MERLANO SIERRA,
a/k/a GEORGE MERLANO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DONALD I. BIERMAN
IRA N. LOEWY
Counsel of Record

BIERMAN, SONNETT, SHOHAT
& SALE, P.A.
Suite 500
200 Southeast 1st Street
Miami, Florida 33131
Telephone: (305) 358-7477

Counsel for Petitioners

55 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW, WHICH AFFIRMED THE PETITIONER'S SEPARATE CONVICTIONS AND SENTENCES FOR CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DISTRIBUTE AND CONSPIRACY TO IMPORT MARIJUANA INTO THE UNITED STATES, IS CONTRARY TO PREVAILING PRECEDENT AND CONSTITUTIONAL PRINCIPLES, WHERE THE COURT OF APPEALS HAS CONSTRUED THE ELEMENTS OF THE OFFENSE OF CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DISTRIBUTE IN SUCH A MANNER AS TO ALLOW THE PETITIONER'S CONVICTION UPON PROOF OF CONSPIRACY TO IMPORT ALONE, THEREBY CAUSING THESE TWO OFFENSES TO BECOME THE SAME UNDER THE TEST SET FORTH IN BLOCKBURGER v. UNITED STATES, 284 U.S. 299 (1932), WITH THE RESULT THAT THE PETITIONER HAS BEEN SEPARATELY CONVICTED AND SENTENCED TWICE FOR THE SAME OFFENSE, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.[1/]

[1/] The parties in the United States Court of Appeals for the Eleventh Circuit were the Petitioner, JORGE MERLANDO SIERRA, a/k/a GEORGE MERLANO and Vito Alberti, a/k/a Joe Lamport as Appellants and the United States of America as Appellee.

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

Other Authorities

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

JORGE MERLANO SIERRA,
a/k/a GEORGE MERLANO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioner, JORGE MERLANO SIERRA, a/k/a GEORGE MERLANO, respectfully prays that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the

Eleventh Circuit, entered in Case No. 82-5841 on March 19, 1984, and April 25, 1984, which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit announced its opinion affirming the Petitioner's convictions on charges of conspiracy with intent to distribute marijuana in violation of 21 U.S.C. §§841 and 846 (1966), and conspiracy to import marijuana into the United States contrary to 21 U.S.C. §§952(a) and 963 (1966) in United States v. Alberti, 727 F.2d 1055 (11th Cir. 1984). That opinion is reproduced in the Appendix. A Petition for Panel Rehearing and Suggestion for Rehearing En Banc was denied by the Court on April 25, 1984. This Order is also reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's Order on Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Fifth Amendment, Double Jeopardy Clause:

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

21 U.S.C. §841(a)(1):

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -
> (1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute, or dispense, a controlled substance;

21 U.S.C. §846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was

the object of the attempt or conspiracy.

21 U.S.C. §952(a):

> (a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II subchapter I of this chapter. . .

21 U.S.C. §963:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Northern District of Florida of conspiracy with intent to distribute marijuana in violation of 21 U.S.C. §§841 & 846 (1966), and conspiracy to import marijuana into the United States contrary to 21 U.S.C. §952(a) and 963 (1966). On appeal, the primary issue presented by the Petitioner to the Circuit Court was whether the trial court had improperly denied his motion for a judgment of acquittal on the charge of conspiracy with intent to distribute marijuana, where the only proof presented by the government to show that the Petitioner had joined in such a conspiracy consisted of evidence that he had joined in an entirely separate conspiracy to import marijuana into the United States.

This case arose out of an ongoing investigation of federal drug law violations, during which the United States Drug Enforcement Administration (DEA) enlisted the cooperation of Jerry Jenkins, an unlicensed pilot, who had previously smuggled methaqualone into the United States. In late December 1981 or early January 1982, Jenkins was approached by one John O'Brien, who wanted him to fly O'Brien's airplane to Jamaica to pick up loads of marijuana. Although O'Brien did have an airplane, he agreed with Jenkins that Jenkins would supply a larger aircraft and a co-pilot, as well as locate an airstrip in Bascom, Florida for use during the return and offload of the marijuana. Jenkins also introduced O'Brien to undercover DEA Agents Vance Huffman and Richard Hahner (posing as the aircraft's co-pilot and owner, respectively).

Although very specific plans were made and Jenkins did fly to Jamaica, no marijuana was ever brought back into the United States.

In the midst of these discussions, O'Brien asked Jenkins and Hahner to participate in a deal to fly marijuana from Colombia for "some Italians from California". O'Brien had a number of discussions with Jenkins and Huffman with regard to the arrangements for the proposed Colombian runs. A meeting was arranged to be held in Atlanta with the Californians and with "Jorge," the Colombian connection.

Shortly thereafter, O'Brien arranged for Jenkins to meet with the co-defendant Alberti, whom O'Brien described as being the representative of the California people, and with the Petitioner in this case, who was referred to as "the Colombian

connection." Discussion at that meeting centered on the exportation of marijuana from Colombia with the Petitioner talking generally about a potential location for landing to pick up the marijuana at a proposed Colombian airfield. Following this meeting, O'Brien, Jenkins and Huffman had further telephone calls and meetings, culminating with a meeting in Panama City on February 11, 1982. Arrangements were made for another meeting in Tallahassee, Florida on February 13, 1982, at which the remainder of the money would be paid by the co-defendant Alberti.

Jenkins and Huffman followed O'Brien to Tallahassee, where, on February 13, 1983, O'Brien, Alberti and the Petitioner in this case met with the pilots in a hotel room. During this meeting, arrangements for the initial

run to Colombia were hammered out. None of those present spoke of the distribution of the marijuana once it entered the United States and the Petitioner's only involvement concerned the exportation of marijuana from Colombia. At a prearranged signal, DEA agents entered the room and arrested the Petitioner and the other defendants in the case.

On appeal to the United States Court of Appeals for the Eleventh Circuit, the Petitioner argued that the trial evidence, taken in the light most favorable to the prosecution, showed only that the Petitioner was part of a group supplying marijuana to be exported from Colombia, who had no concern with or interest in any stateside distribution of the contraband. While the Petitioner may have assumed or even known that a distribution would

ultimately take place, there was no evidence submitted by the government to show that he participated in any arrangements or agreed to further that objective, or even that he had any interest in whether that result was likely to succeed. The Court of Appeals disagreed, holding that because the Petitioner had knowledge of the proposed distribution of the marijuana, he could be found guilty of conspiracy with intent to distribute based upon nothing more than proof that he had conspired to import that marijuana into the United States. It is this ruling by the Court of Appeals which the Petitioner is asking this Court to review.

REASONS FOR GRANTING THE WRIT

WHETHER THE DECISION BELOW, WHICH AFFIRMED THE PETITIONER'S SEPARATE CONVICTIONS AND SENTENCES FOR CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DISTRIBUTE AND CONSPIRACY TO IMPORT MARIJUANA INTO THE UNITED

STATES, IS CONTRARY TO PREVAILING PRECEDENT AND CONSTITUTIONAL PRINCIPLES, WHERE THE COURT OF APPEALS HAS CONSTRUED THE ELEMENTS OF THE OFFENSE OF CONSPIRACY TO POSSESS MARIJUANA WITH INTENT TO DISTRIBUTE IN SUCH A MANNER AS TO ALLOW THE PETITIONER'S CONVICTION UPON PROOF OF CONSPIRACY TO IMPORT ALONE, THEREBY CAUSING THE TWO OFFENSES TO BECOME THE SAME UNDER THE TEST SET FORTH IN BLOCKBURGER v. UNITED STATES, 284 U.S. 299 (1932), WITH THE RESULT THAT THE PETITIONER HAS BEEN SEPARATELY CONVICTED AND SENTENCED TWICE FOR THE SAME OFFENSE, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT?

As this Court has repeatedly stated, the Double Jeopardy Clause of the Fifth Amendment serves three primary purposes. First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishment for the same offense. See, e.g., North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Brown v. Ohio, 432 U.S. 161, 165

(1977). The test for determining whether two separate statutory offenses are the same was set forth by this Court in Blockburger v. United States, 284 U.S. 299, 304 (1932);

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Applying this test in Albernaz v. United States, 450 U.S. 333 (1981), this Court held that conspiracy to import marijuana, in violation of 21 U.S.C. §963, and conspiracy to distribute marijuana, in violation of 21 U.S.C. §846, each proscribed separate statutory offenses, the violation of which can result in the imposition of consecutive sentences. As this Court explained, at 450 U.S. 339:

> The statutory provisions at issue

> here clearly satisfy the rule announced in Blockburger and petitioners do not seriously contend otherwise. Sections 846 and 963 specify different ends as the proscribed object of the conspiracy - distribution as opposed to importation - and it is beyond peradventure that 'each provision requires proof of a fact [that] the other does not.'

In Albernaz, supra, this Court was facilitated in reaching its decision by the fact that the United States Court of Appeals which had earlier considered the case had clearly treated 21 U.S.C. §963 and 21 U.S.C. §846 as constituting separate offenses, each of which required proof that the accused actually joined in the objectives of both of the charged conspiracies. Thus, the panel, and ultimately, this Court, affirmed Albernaz' and Rodriguez' separate convictions and sentences based upon proof that their agreement had dual objectives. However, the panel of the Court of Appeals, in its decision in

United States v. Rodgiruez, 585 F.2d 1234 (5th Cir. 1978), also held that the convictions for conspiracy to distribute marijuana of two co-defendants, Smigowski and Martins, could not stand where there was no evidence with respect to their involvement in a distribution scheme except what might be inferred from their participation in an agreement to import. 585 F.2d at 1247.

The panel decision of the Court of Appeals in the case at bar does not draw such a distinction. The Petitioner's conviction for conspiracy with intent to distribute marijuana was upheld based upon nothing more than proof that he was involved in an agreement to import marijuana into the United States and that he knew that other co-defendants were conspiring to distribute the marijuana once it arrived. However, such knowledge can

always be inferred from any importation scheme and the effect of the holding of the Court of Appeals is to make every conspiracy to import a conspiracy to distribute as well.

What the Court of Appeals has done, through judicial construction, is to merge the separate statutory offenses of conspiracy to import and conspiracy to distribute into one. For if proof that a defendant joined in the objective of a conspiracy to distribute can be satisfied by proof only that he joined in the objective of a conspiracy to import, than the former offense no longer requires proof of a fact which the latter does not, and under Blockburger v. United States, supra, the offenses are the same. Such a result violates not only the plain meaning of the Double Jeopardy Clause, but also the clear intent of Congress to create two

separate statutory offenses, with different elements and possible cumulative punishment. Albernaz v. United States, supra.

The decision below represents a dangerous erosion of the constitutional and statutory principles reaffirmed and established by this Court in Albernaz. The basis for this Court's holding in Albernaz was the belief, that under the statutory scheme intended by Congress, there is a distinction between distribution and importation. The precedent established by the Court of Appeals in this case eliminates this distinction, in effect permitting an accused to be convicted of conspiracy to distribute merely upon proof that he conspired to import. This Court should take this opportunity to clearly delineate the distinction between these two offenses, so as to reaffirm both the

intent of Congress and the constitutional proscription against twice being placed in jeopardy for the same offense.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

BIERMAN, SONNETT, SHOHAT
& SALE, P.A.
Suite 500
200 Southeast 1st Street
Miami, Florida 33131
(305) 358-7477

By_____
DONALD I. BIERMAN
IRA N. LOEWY

A P P E N D I X

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

Vito ALBERTI, a/k/a Joe Lamport, Jorge Merlano Sierra, a/k/a George Merlano, Defendants-Appellants.

No. 82-5841.

United States Court of Appeals,
Eleventh Circuit.

March 19, 1984.

Defendants were convicted before the United States District Court for the Northern District of Florida, Lynn C. Higby, J., of conspiracy to possess marijuana with intent to distribute and of conspiracy to import marijuana into United States, and they appealed. The Court of Appeals, Fay, Circuit Judge, held that: (1) evidence was sufficient to support finding of multiple conspiracies; (2) evidence was sufficient to support convictions of conspiracy to possess marijuana with

intent to distribute; and (3) no error was committed by district court in denying defendants' motion to sever trial from trials of codefendants.

Affirmed.

1. Criminal Law #1159.2(10)

Court of appeals may reverse jury's finding that multiple conspiracies existed only if evidence could not permit reasonable jurors to have found, beyond a reasonable doubt, that several conspiracies existed.

2. Conspiracy #47(12)

In prosecution for conspiracy with intent to distribute marijuana and for conspiracy to import marijuana into the United States, evidence was sufficient to support conclusion that defendants were engaged in multiple conspiracies. Comprehensive Drug Abuse Prevention and

Control Act of 1970, §§ 401, 406, 1002(a), 1013, 21 U.S.C.A. §§ 841, 846, 952(a), 963.

3. Criminal Law ⚖1144.13(3, 5)

In applying applicable standard of review for a challenge to sufficiency of evidence to convict, evidence and all reasonable inferences are to be viewed in a light most favorable to the government.

4. Conspiracy ⚖27, 40.1

Although in most conspiracy cases, government must demonstrate an overt act in furtherance of conspiracy, no such requirement exists when charge involves a conspiracy to possess marijuana with intent to distribute; what government must demonstrate is that a conspiracy existed, that defendant had knowledge of it, and that he or she voluntarily became a part of it. Comprehensive Drug

Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

5. Conspiracy #47(12)

Existence of a drug conspiracy may be demonstrated by circumstantial evidence such as inferences from conduct of defendant or circumstances indicating scheme or plan.

6. Conspiracy #40.1

To be found guilty of conspiracy to possess marijuana with intent to distribute, a defendant need not have knowledge of all details of conspiracy, and may only play a minor role in entire operation. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. §846.

7. Conspiracy #47(12)

In prosecution for conspiracy to possess marijuana with intent to

distribute, evidence of defendant's extensive knowledge of and interest in handling marijuana once it reached United States was sufficient to sustain conviction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

8. Criminal Law #622(1), 1148

Decision to sever an accused's trial from trials of his codefendants lies within sound discretion of district judge, and will not be overturned in absence of abuse of discretion. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

9. Criminal Law #1166(6)

A district court decision not to sever trial of an accused from trials of his codefendants will not be overturned on appeal unless accused can demonstrate that he received a fundamentally unfair trial and suffered compelling prejudice

against which trial court was unable to offer protection. Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

10. Criminal Law ⚖622(2)

Where evidence of two separate drug deals was so intertwined that one case could not be presented without substantial mention of other, failure to sever trial of defendants in one case from trial of defendant in other case was not error. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406 1022(a), 1013, 21 U.S.C.A. §§ 841, 846, 952(a), 963; Fed.Rules Cr.Proc.Rule 14, 18 U.S.C.A.

11. Conspriacy ⚖45

In prosecution for conspiracy to possess marijuana with intent to distribute and for conspiracy to import marijuana into United States, district court did not err in refusing to allow

defendants to inquire as to why Goverment did not bring marijuana to landing site prior to arrest and thus determine the role of each conspirator in drug smuggling operation. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 1002(a), 1013, 21 U.S.C.A. §§ 841, 846, 952(a), 963.

12. Criminal Law #723(1)

In prosecution for conspiracy to possess marijuana with intent to distribute and for conspiracy to import marijuana into the United States, prosecutor's closing argument did not deprive defendants of a fair trial despite assertion that prosecutor's mention of threat to lives of law enforcement officials at landing strip ws prejudicial. Comprehensive Drug Abuse Prevention and Control Act of

1970, §§ 401, 406, 1002(a), 1013, 21 U.S.C.A. §§ 841, 846, 952(a), 963.

Appeals from the United States District Court for the Northern District of Florida.

Before TJOFLAT and FAY, Circuit Judges, and WISDOM*/, Senior Circuit Judge.

FAY, Circuit Judge:

Appellants Vito Alberti and Jorge Merlano Sierra appeal their convictions by the United States District Court for the Northern District of Florida on charges of conspiracy with intent to distribute marijuana in violation of 21 U.S.C. §§ 841 and 846 (1966), and conspiracy to import marijuana into the United States contrary to 21 U.S.C. §§ 952(a) and 963 (1966). Appellants

---

*/ Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

present several significant issues for consideration by this court: (1) whether the evidence adduced at trial supported the jury's finding that the defendants were engaged in multiple conspiracies; (2) whether the evidence was sufficient to prove that appellants knowingly and intentionally participated in a conspiracy to possess with intent to distribute marijuana; and (3) whether the district court abused its discretion in denying appellants' motions for severance. Finding that the evidence was sufficient to support the finding of multiple conspiracies and to convict both defendants upon the conspiracy to possess with intent to distribute count and that no error was committed by the district court in its denial of appellants' motion to sever, we affirm both convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

As part of an ongoing investigation of federal drug law violations, the United States Drug Enforcement Administration (DEA) enlisted the cooperation of Jerry Jenkins, an unlicensed pilot who had previously smuggled methaqualone into the United States. Jenkins agreed to report to the DEA any solicitations which he received for his services as a drug courier. In late December, 1981 or early January, 1982, Jenkins was approached by John O'Brien. O'Brien wanted Jenkins to fly O'Brien's airplane to Jamaica to pick up two loads of marijuana. Although O'Brien did have an airplane, he agreed with Jenkins that Jenkins would supply a larger airplane, a Beechcraft Queenair, and a co-pilot. Jenkins also located an airstrip in Bascom, Florida for use during the return and offload of the

marijuana from Jamaica. O'Brien and Jenkins discussed very specific details regarding the proposed Jamaican runs, including the arming of the Bascom airstrip and the amounts to be collected by Jenkins, by his co-pilot (DEA agent Vance Huffman) and by "the plane's owner" (DEA agent Richard Hahner). Jenkins did fly to Jamaica in the Queenair on February 3, 4 and 5, 1982, but did not bring back any marijuana.

In the midst of these discussions regarding the Jamaican runs, O'Brien asked Jenkins and Hahner to participate in a deal to fly marijuana from Colombia for "some Italians from California." O'Brien had a number of discussions with Jenkins and Huffman with regard to the arrangements for the proposed Colombian runs, several of which were tape recorded by the government and used as evidence at trial. O'Brien mentioned a

"Vito" as the "right hand man" in the Colombian deal and as the "lieutenant of the big man from California." A meeting was to be held in Atlanta with the Californians and with "Jorge," the Colombian connection. O'Brien told Jenkins, Huffman and Hahner that their compensation would be fixed in advance for the Colombian deal, and stated that the landing strip in Bascom would be used to unload. O'Brien would retain a portion of the marijuana to secure his payment and that of the pilots and the airplane owner. The "California people" would have a representative on the airstrip to take their portion of the cargo. Eight thousand dollars advance money for the airplane was to be received in Atlanta.

Soon thereafter, O'Brien arranged for Jenkins to meet "Vito" (Alberti), whom O'Brien described as "working for

the big man," and "Jorge" (Sierra), who was referred to as "the Colombian connection." Sierra in turn introduced Henry, a Colombian who did not speak English, to the pilots. Henry was to be part of the crew in Colombia which loaded the marijuana and he was introduced to Jenkins so that they could recognize each other. Alberti and Sierra described the landing site to Jenkins and handed him three thousand dollars.

After several days of further telephone calls and meetings with O'Brien, Jenkins and Huffman met with O'Brien in Panama City, Florida on February 11, 1984. O'Brien stated tha the three thousand dollars, which would be paid in Tallahassee during a meeting later that day with Alberti and Sierra, was flowing from the "big man in California" through Alberti.

Jenkins and Huffman followed O'Brien to Tallahassee where O'Brien, Alberti and Sierra met with the pilots in a hotel room on February 13, 1982. During this meeting the arrangements for the initial run to Colombia were being hammered out. Sierra and Alberti discussed with the pilots the preferred dates for departure from and re-entry to the United States, the specific location of the Colombia airstrip, the amount of marijuana to be transported, and the relative profitability of "running" marijuana and methaqualone. After extensive discussion finalizing the details of the first Colombian venture, DEA agents entered the hotel room and arrested the appellants.

Alberti, Sierra, and O'Brien were charged in a two-count indictment with conspiracy to possess with intent to distribute more than one thousand pounds

of marijuana in violation of 21 U.S.C. §§ 841 and 846 (1966), and conspiracy to import marijuana into the United States contrary to the provisions of 21 U.S.C. §§ 952(a) and 963 (1966). All defendants entered pleas of not guilty and requested trial by jury.

Prior to trial, the defendants filied several motions, including motions for severance. These motions for severance were denied. After a four-day trial, a jury found Alberti, Sierra and O'Brien guilty as to both counts. The court then sentenced Alberti to a ten-year jail term and a $100,000 fine on Count I, and five-year consecutive sentence on count II. Sierra was given a term of incarceration of fifteen years and fined $125,000 on Count I, and a concurrent term of five years and a $15,000 fine on Count II. Alberti and Sierra appeal from these

convictions.

II. THE FINDING OF MULTIPLE CONSPIRACIES

The appellants urge that the evidence adduced at trial did not support the jurors' conclusions that appellants were guilty of two separate and distinct conspiracies. They urge that because the plot to smuggle marijuana from Colombia to the United States constituted one agreement among an identifiable group of persons, the evidence could only support the appellants' convictions as to one conspiracy. We disagree.

[1,2] The appellants' argument is the flip side of the contention, often advanced in conspiracy cases, that the evidence at trial cannot support a jury finding that a single conspiracy existed. United States v. Brito, 721 F.2d 743 at 746 No. 82-5168, slip op. at

941 (11th Cir. 1983); United States v. Watson, 669 F.2d 1374, 1379-80 (11th Cir. 1982); United States v. Tilton, 610 F.2d 302, 307 (5th Cir. 1980).[1/] It is important to note that the scope of our review in analyzing the single/multiple conspiracy question is identical whether a defendant is claiming, as here, that there is one conspiracy notwithstanding a jury finding of two, or whether he is contesting a jury finding of one overall conspiracy. The determination of whether there are one or more conspiracies in a given case is a classic jury question. United States v. Brito, at 747; United States v. Michel, 588 F.2d 986, 995 (5th Cir.),

---

[1/] Decisions of the Fifth Circuit handed down prior to September 30, 1981, are binding precedent on this Court unless and until overruled or modified by this Court en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

cert.denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed2d 32 (1979); United States v. Rodriguez, 509 F.2d 1342, 1348 (5th Cir. 1975). We may thus reverse the jury's finding that multiple conspiracies existed only if the evidence could not permit reasonable jurors to have found, beyond a reasonable doubt, that several conspiracies existed. See United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B 1982)(en banc). Reviewing the evidence, we conclude that there was support for the jury's conclusion that appellants were engaged in more than one conspiracy.[2/]

[2/] In addition, appellants asked for a charge on multiple conspiracies and such a charge was given. The jury instruction accurately conveyed the law in this area. United States v. Brito, at 747. The jury properly applied the instruction and found that appellants had engaged in more than one conspiracy.

III. SUFFICIENCY OF THE EVIDENCE

[3] Appellants challenge the sufficiency of the evidence supporting their convictions for conspiracy to possess with the intent to distribute marijuana. Appellant Alberti further contends that the district court erred in not granting him a judgment of acquittal as to this count. The applicable standard of review for a sufficiency challenge was recently enunciated in United States v. Bell, 678 F.2d at 547:

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

678 F.2d at 549 (footnote omitted). In applying this standard we are also mindful that the evidence and all

reasonable inferences are to be viewed in a light most favorable to the Government. Id. See also Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed 680 (1942).

[4] The most basic element required to establish a conspiracy claim is an agreement between two or more persons to violate federal narcotics laws. United States v. Lee, 694 F.2d 649, 652 (11th Cir. 1983), United States v. Tamargo, 672 F.2d 887, 889 (11th Cir. 1982), cert.denied, ___U.S.___, 103 S.Ct. 141, 74 L.Ed2d 119 (1982). Although in most conspiracy cases the Government must also demonstrate an overt act in furtherance of the conspiracy, no such requirement exists when the charge involves a drug conspiracy in violation of 21 U.S.C. § 846. United States v. Badolato, 701 F.2d 915, 919-20 (11th Cir. 1983). What

the Government must demonstrate is that a conspiracy existed, that the defendant had knowledge of it, and that he or she voluntarily became a part of it. United States v. Lippner 676 F.2d 456, 466 (11th Cir. 1982).

[5,6] It is also clear that the existence of a drug conspiracy may be demonstrated by circumstantial evidence such as inferences from the conduct of the defendant or the circumstances indicating a scheme or plan. Lee, 694 F.2d at 652; Lippner, 676 F.2d at 466. Moreover, the requirement of knowledge of the conspiracy agreement refers simply to knowledge of the essential objective of the conspiracy. Tamargo, 672 F.2d at 889. To be found guilty, a defendant need not have knowledge of all the details of the conspiracy, and may only play a minor role in the entire operation. Lee, 694 F.2d at 652; United

States v. Nickerson, 669 F.2d 1016, 1022 (th Cir.19820.

Appellants do not contest that a conspiracy to possess with intent to distribute marijuana existed among some persons. Likewise, neither appellant seriously contests that he had knowledge of the existence of the broad Colombian operation. Appellants argue, rather, that the evidence does not establish their joinder or association with the conspiracy to distribute the marijuana. They contend that O'Brien kept the importation scheme separate from the distribution plan, and that they had no interest or stake in the fate of the marijuana once it reached the United States. Viewing the evidence in a light most favorable to the government, we find that the record indicates otherwise.

[7] The testimony of the agents at

trial and the tape-recorded conversation among defendants reveal Alberti and Sierra's extensive knowledge of and interest in handling the marijuana once it reached the United States. Circumstantial evidence provided inter alia, (1) that the "California people" who were to receive part or all of the load would have a representative at the Bascom airstrip to take their share, (2) that a portion of the money used to finance the operation came from proceeds, collected by Alberti, from other drug distributions in New York; (3) that Sierra was quite concerned as to the profits to be made through marijuana distribution; (4) that both appellants discussed the marketing prospects of the operation; and (5) that Sierra would have a representative at Bascom to meet the aircraft as it arrived from Colombia. In short, it is

clear that Alberti and Sierra had extensive knowledge of the proposed distribution plan. Accordingly, we conclude that a reasonable jury could have found beyond a reasonable doubt that the evidence established Alberti's and Sierra's knowing participation in that conspiracy, and that the district court did not err in denying Alberti's motion for a judgment of acquittal.

IV. MOTIONS FOR SEVERANCE

[8, 9] Each appellant maintains that his trial should have been severed from the trials of his co-defendants. Federal Rule of Criminal Procedure 14 authorizies severance if the district court determines prejudice will result from joinder. But the decision to sever lies within the sound discretion of the district judge, and will not be overturned in the absence of abuse of

that discretion. United States v. Riola, 694 F.2d 670, 672 (11th Cir. 1983). Moreover, a district court decision will not be overturned unless appellants can demonstrate that they received a fundamentally unfair trial nd "suffered compelling prejudice against which the trial court was unable to offer protection." Id.

[10] Both Alberti and Sierra maintain that they suffered a compelling prejudice from extrinsic evidence admitted against their co-defendant O'Brien, and that in the absence of this spill-over effect they would not have been convicted. The evidence which appellants primarily complain of concerned the Jamaican deal in which O'Brien, with a separate set of co-conspirators, engineered a plan which was largely repeated with respect to the Colombian marijuana. We find no merit

to appellants' contentions. We agree with the district court that the evidence of the Jamaican and the Colombian deals was so intertwined that the latter case could not be presented without substantial mention of the former. Such evidence is not "extrinsic" and is admissible. See United States v. McCrary, 699 F.2d 1308 at h.n. 4 (11th Cir.1983). Additionally, a review of the record convinces us that there was no danger that the jury could be misled into believing that either Alberti or Sierra had anything to do with the Jamaican trip. See Lippner, 676 F.2d at 464-65. The great majority of the testimony regarding the Jamaican deal was presented in separate segments of the witness' testimony than descriptions of the Colombian plans. Further, at each introduction of testimony as to the Jamaican plans, the

trial court gave a similar act instruction and noted that the evidence was only admissible against O'Brien.

V. OTHER ISSUES

[11, 12] The appellants additionally raise two other arguments: (1) that the district court erred in refusing to allow appellants to inquire as to why the government did not bring marijuana to the landing site and thus determine the role of each conspirator in the drug smuggling operation; and (2) that the prosecutor's closing argument deprived appellants of a fair trial in that it mentioned the possible death of law enforcement officials on the Bascom landing strip. We find no merit whatsoever to these arguments.

VI. CONCLUSION

Finding no error in the trial court proceedings, we AFFIRM both convictions.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-5841

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

VITO ALBERTI, a/k/a
Joe Lamport,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion March 19, 1984, 11 Cir., 198_,
_____F.2d_____).

Before TJOFLAT and FAY, Circuit Judges, and WISDOM*, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/s Peter T. Fay
United States Circuit Judge

*Honorable John Minor Wisdom, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.